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Tocqueville the Nationalist:
Reassessing Federalism in *Democracy in America*

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The University of Texas at Austin, 2015
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Some read Alexis de Tocqueville as a great proponent of federalism. However, Tocqueville's account of federalism in *Democracy in America* is complicated and multifaceted. He discusses the advantages of administrative decentralization, as well as the advantages of governmental centralization. Moreover, his characterization of the United States Constitution seems to vacillate between a confederation of sovereign states and a unified nation with a strong central government. Finally, Tocqueville describes the great power he perceives in the state governments, and the natural influence they seem to enjoy over the people relative to the national government. To conclude from these discussions that Tocqueville is an advocate of federalism, I argue, oversimplifies his view. Indeed, Tocqueville offers a gradual reassessment of American federalism over the course of *Democracy in America*, beginning with such accounts as the conciliatory description of federalism in *The Federalist Papers* and the theories of the southern nullifiers, but eventually coming to very different conclusions about the constitutional logic. Ultimately, Tocqueville is not the champion of federalism that some think he is.

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I. Introduction

Proponents of a robust federalism frequently claim Alexis de Tocqueville as an ally. Many cite his famous discussions of New England townships, private associations,¹ and administrative decentralization² to draw conclusions about the virtues of local government and even states' rights.³ Because Tocqueville's voice carries such weight and inspires such reverence even within the larger American canon, academics and politicians sympathetic to federalism would have little reason or motivation to hesitate before enlisting Tocqueville to their cause. Nonetheless, this fairly wide acceptance of Tocqueville as an advocate of federalism invites a closer, critical examination of his

¹ Alexis de Tocqueville, *Democracy in America*, Trans. Arthur Goldhammer, New York: Library of America, 2004, 66-89, 215-223.

² *Ibid.* 97-110.

³ Some takes on this subject include Barbara Allen, *Alexis de Tocqueville on the Covenantal Tradition of American Federal Democracy*, *Publius* 28.2 (Spring 1998); Joseph Alulis, *The Price of Freedom: Tocqueville, the Framers, and the Antifederalists*, *Perspectives on Political Science*, 27.2 (Spring 1998): 85-91; David Broyles, *Tocqueville on Federalism*, in *Tocqueville's "Defense of Human Liberty,"* Ed. Peter Lawler and Joseph Alulis, New York: Garland, 1993; Susan P. Fino, *De Tocqueville or Disney? The Rehnquist court's Idea of Federalism*, 66 *Albany Law Review*, 2003; Robert T. Gannett, Jr., *Tocqueville and Local Government: Distinguishing Democracy's Second Track*, *Review of Politics* 67.4 (Fall 2005): 721-736; Ralph C. Hancock, *Tocqueville on the Good of American Federalism*, *Publius* 20.2 (Spring 1990): 89-108; A. E. Dick Howard, *Garcia and the Values of Federalism*, *Georgia Law Review* 19.4 (Summer 1985): 789-797; Philip C. Kissam, *Alexis de Tocqueville and American Constitutional Law: On Democracy, the Majority Will, Individuals Rights, Federalism, Religion, Civic Associations and Originalist Constitutional Theory*, *Maine Law Review* 59.1 (2007): 36-74; John C. Koritansky, *Decentralization and Civic Virtue in "Tocqueville's New Science of Politics,"* *Publius* 5.3 (Summer 1975): 63-81; Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, *American Political Science Review* 101.3 (August 2007): 459-477; John Kincaid, *Federal Democracy and Liberty*, *Political Science and Politics* 32.2 (June 1999): 211-216; John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, *California Law Review* 90.2 (March 2002): 485-571; Wilson Carey McWilliams, *Democracy and the Citizen: Community, Dignity, and the Crisis of Contemporary Politics in America*, in *How Democratic is the Constitution?* Ed. Robert A. Goldwin and William A. Schambra, Washington, D.C.: American Enterprise Institute, 1980.

Delba Winthrop, *Tocqueville on Federalism*, *Publius* 6.3 (Summer 1976): 93-115; Catherine H. Zuckert, *Reagan and that Unnamed Frenchman (De Tocqueville): On the Rationale for the New (Old) Federalism*, *Review of Politics* 45.3 (July 1983): 421-442.

account, that he may be invoked only to the extent that his arguments actually support particular theories of federalism.

In addition to his praise of local politics and government, Tocqueville's account of the American Constitution in *Democracy in America* is another potential source of support for advocates of federalism. Tocqueville draws heavily on *The Federalist Papers* to understand the Constitution,⁴ often paraphrasing and quoting directly the papers' explanations. In many ways, he seems to take the authors at their word about the nature of the Constitution. However, at other points, Tocqueville comes to conclusions about the American constitutional order that depart from the apparent conclusions of the *The Federalist Papers*. For example, though in *Federalist* 39 Madison concludes that the American Constitution was "neither national nor federal...but a composition of both,"⁵ Tocqueville concludes that the American Constitution is "not a federal government,...but an incomplete national government."⁶

While the Federalists may have had incentive to obscure certain aspects of the new Constitution in their campaign for ratification,⁷ Tocqueville's project was one of illumination. And so, although Tocqueville may begin with the text of the *Federalist Papers*, I argue that he comes to different conclusions after thinking through the logic of

⁴ Alulis 85.

⁵ James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, Ed. Clinton Rossiter, New York: Signet, 1961, 242.

⁶ Tocqueville 178. Whether or not the Federalists ultimately would have agreed with Tocqueville, they would not have readily conceded his characterization in the ratification debates against the Anti-Federalists.

⁷ See Jeffrey K. Tulis and Nichole Mellow, *The Anti-Federalist Appropriation, American Political Thought* 3.1, Chicago UP (Spring 2014): 157-166.

the institutions these essays describe, in spite of any obfuscation the authors may have intended. I demonstrate how Tocqueville gradually reassesses his understanding and so modifies his description of American federalism throughout *Democracy in America*, beginning with what seems to be *The Federalist*'s description, but ultimately coming to a different view.

Finally, one could interpret Tocqueville's description of the authority of the states as "natural," and "like a father's authority"⁸ as evidence of his endorsement of federalism. He speaks at great length of the influence and loyalty that the states seem to enjoy with the people, as compared to the national legislature, due to their tendency to placate majorities more frequently. However, Tocqueville's tone in these passages is better explained as concerned rather than approving or indifferent. In his concern regarding the power of the states, Tocqueville seems to uncover a disconnect between what is required by the Constitution's logic and necessary for the Constitution's survival, and that state of affairs he perceives during his travels in America.

As Tocqueville understood it, his project compelled him to ascertain the working out of democracy in America⁹; and so, he "did not try to look at things differently" from the parties involved, but did try "to see further."¹⁰ In this paper, I argue that Tocqueville did indeed see further than the sources he confronted, and sometimes even further than the state of affairs in America might have suggested at first blush, particularly on the

⁸ Tocqueville 189.

⁹ Ibid. 15.

¹⁰ Ibid. 17. See also Ralph C. Hancock, *Tocqueville on the Good of American Federalism*, *Publius* 20.2 (Spring 1990), 89.

subject of federalism. We as readers of Tocqueville must try to see further, too. Rather than draw grand conclusions from a few of Tocqueville's more famous discussions, this paper seeks a thorough and deeper account of Tocqueville's theory of federalism, including due consideration of the reasons he gives for endorsing federalism, and the particular characteristics of the federalism he endorses. Ultimately, this paper's primary preoccupation is Tocqueville's understanding of the Constitution's logic, grounded in his keen sense of what the Constitution's survival will require.

II. Governmental and Administrative (De)centralization

The key to Tocqueville's general theory of federalism, and the source of some misunderstandings regarding his prescriptions for government, can be found in his distinction between governmental and administrative (de)centralization. Governmental centralization is the concentration of power in one place to direct those interests that are "common to all parts of the nation," such as "the enactment of general laws and relations with foreigners."¹¹ Apart from the right to issue general laws from a unified center, Tocqueville also associates governmental centralization with the ability to "make people obey" its laws.¹² The German Empire, for example, never achieved governmental centralization, since "the separate parts of that great body always had the right or option to withhold their cooperation from the repositories of common authority in the very matters that touched the interests of all citizens."¹³ Upon reading this description, the American mind will undoubtedly recall the nullification crises of the nineteenth century. Having witnessed the tumult in the years leading up to the nullification crisis, Tocqueville emphasizes the importance of maintaining "a high degree of governmental centralization," and particularly in the national government.¹⁴

Insofar as Tocqueville limits his definition and prescription to those issues "common to all parts of the nation,"¹⁵ governmental centralization is compatible with

¹¹ Tocqueville 97.

¹² Ibid. 99.

¹³ Ibid.

¹⁴ Ibid. 98.

¹⁵ Ibid. 97.

some kind and degree of local autonomy as well, bringing us to his account of administrative centralization and decentralization. Administrative centralization Tocqueville defines as concentrating in a central authority the power to direct those interests “special to certain parts of the nation,” such as local projects.¹⁶ To the same degree that he advocates governmental centralization, he cautions against administrative centralization. Tocqueville explains that a country’s administration could be centralized to such a degree that the national government dictates how localities ought to implement even the smallest details of law.¹⁷ Though he maintains that such centralization tends to promote greater accuracy and efficiency in a nation’s administration,¹⁸ Tocqueville explains that it detaches individuals from the fate of their country, so divorcing them from their own interests.¹⁹ This inhibits any decision-making from occurring among the people themselves, leaving them no opportunity to practice politics and develop those virtues that can only be cultivated in political life.²⁰ As a result, people become insular and their interests parochial, consequences that damage both the individuals and the polity in the long run.

These passages certainly reflect an appreciation for the local, not because Tocqueville thinks government is better at the local level, but because he thinks local initiatives provide occasion for developing civic virtues.²¹ He admires “not the

¹⁶ Ibid. 98.

¹⁷ Ibid. 820-821.

¹⁸ Ibid. 107.

¹⁹ Ibid. 105.

²⁰ Koritansky 72.

²¹ Zuckert 421.

administrative effects of decentralization but the political effects.”²² And indeed, his understanding of administrative decentralization involves not the authority to make law, but the exercise of delegated power to enforce that law made at higher levels of government.²³ Such decentralization justifies neither nullification and interposition, nor entrenched powers of the states as a matter of right. Tocqueville offers generous praise for federalism,²⁴ insofar as it tends to create space for more people to participate directly in politics. He states, “No one can be more appreciative of the advantages of the federal system than I. I see it as one of the most potent arrangements there is for making men prosperous and free. I envy the lot of the nations that have been permitted to adopt it.”²⁵ Even with the benefits that come with such opportunity for self-government,²⁶ however, he doubts that “a confederated nation can hold out for long against an equally powerful nation whose government is centralized.”²⁷ Moreover, we later discover his apprehension that confederacy and *governmental* decentralization also serves to encourage internal strife.²⁸

Given the nature of both his praise and worries respecting federalism and decentralization, to say nothing of his prescription for governmental centralization, it is

²² Tocqueville 106.

²³ Phillip C. Kissam, *Alexis de Tocqueville and American Constitutional Law: On Democracy, the Majority Will, Individuals Rights, Federalism, Religion, Civic Associations and Originalist Constitutional Theory*, *Maine Law Review* 59.1 (2007) 60.

²⁴ A. E. Dick Howard, *Garcia and the Values of Federalism*, *Georgia Law Review* 19.4 (Summer 1985) 790; John Kincaid, *Federal Democracy and Liberty*, *Political Science and Politics* 32.2 (June 1999) 213.

²⁵ Tocqueville. 193.

²⁶ Winthrop 93; Hancock 102; Zuckert 423.

²⁷ Tocqueville 193.

²⁸ *Ibid.* 450.

not clear that Tocqueville would advocate certain categorical prerogatives of the states to be held beyond the reach of a national government. Indeed, this initial more theoretical account of federalism and (de)centralization gives us reason to think the reverse. As he describes the importance of concentrating the power necessary to address matters pertaining to the general welfare²⁹ and to “make people obey” the law,³⁰ it is difficult to see what reason Tocqueville would offer for granting the states any power beyond a preliminary deference in the governance of local affairs, that is, enough power to allow the common citizen to engage in political projects and so develop the sort of civic spirit that only comes with having a vested interest in the community. Both governmental and administrative functions are sources of agency and entail a certain authority. However, while governmental power involves that power that is truly legislative in its ability to govern and bind an entire people on an equal basis, administrative power involves the permission from higher levels of government simply to exercise discretion in the gaps that occur in the broad structures of law already in place.

All of this raises the question of what levels of government in the United States would Tocqueville have exercise governmental power, and what levels would he have exercise administrative power given the nature of the Constitution and the needs of the polity. The answers to these questions will determine the extent to which Tocqueville does or does not advocate a robust federalism for America.

²⁹ Ibid. 97.

³⁰ Ibid. 99.

III. Champion of Federalism?

In her article, *Reagan and that Unnamed Frenchman (De Tocqueville)*, Catherine Zuckert describes how Ronald Reagan read Tocqueville as a great supporter of American federalism. She quotes him: “[I]n America when a citizen saw a problem that needed solving he would cross the street and talk to a neighbor about it and the first thing you know a committee would be formed and before long the problem would be solved.”³¹ Reagan concludes by stating that, according to Tocqueville, “not a single bureaucrat would have been involved.”³² Of course, Tocqueville does praise local politics and caution against centralized administration.³³ But from this fact, Reagan seems to draw the conclusion that Tocqueville would endorse federalism of a particular kind and to serve particular ends. Indeed, in this speech, he would go on to argue for the devolution of social welfare programs to the governments,³⁴ a topic which Tocqueville never addresses specifically. Moreover, as Zuckert explains, the underlying assumption of such endorsements of federalism is often that devolution and respect for states’ rights brings greater efficiency and prosperity to government, ends that Tocqueville never promises would follow from federalism or decentralization.³⁵ To what extent can we conclude,

³¹ Zuckert 421.

³² Ibid.

³³ Tocqueville 193, 457.

³⁴ Zuckert 421.

³⁵ Ibid. Zuckert argues that Tocqueville’s primary concern is actually the preservation of political liberty and self-government, rather than greater efficiency or prosperity. However, Tocqueville does explain that Americans of the nineteenth century attributed their continued prosperity to the preservation of “republican forms” (Tocqueville 183).

then, that Tocqueville's endorsement of local politics entails a particular brand of federalism, with specific powers reserved to the states?

In fact, many have characterized Tocqueville as an advocate of some form of federalism. However, while some note that Tocqueville's praise of federal structures is rooted in the occasion they provide for self-government and civic virtue, ends which we find explicitly in *Democracy in America*, others maintain that his praise entails not simply the preservation of opportunities to engage in self-government, but the entrenchment of states' rights, as a constitutional matter, beyond any authority of the national government.³⁶ John O. McGinnis's develops such an argument, arguing that Tocquevillian thinking on federalism and decentralization actually serves as justification for the jurisprudence of the Rehnquist Court.³⁷ Following Tocqueville, he explains that "the dual structure of government mobilizes the civic engagement necessary for national as well as local government."³⁸ McGinnis goes on to conclude that this benefit that Tocqueville identified with federalism justifies the decisions of the Court in such cases as

³⁶ Barbara Allen, *Alexis de Tocqueville on the Covenantal Tradition of American Federal Democracy*, *Publius* 28.2 (Spring 1998); Joseph Alulis, *The Price of Freedom: Tocqueville, the Framers, and the Antifederalists*, *Perspectives on Political Science*, 27.2 (Spring 1998): 85-91; David Broyles, *Tocqueville on Federalism*, in *Tocqueville's "Defense of Human Liberty,"* Ed. Peter Lawler and Joseph Alulis, New York: Garland, 1993; Susan P. Fino, *De Tocqueville or Disney? The Rehnquist court's Idea of Federalism*, 66 *Albany Law Review*, 2003; Robert T. Gannett, Jr., *Tocqueville and Local Government: Distinguishing Democracy's Second Track*, *Review of Politics* 67.4 (Fall 2005): 721-736; A. E. Dick Howard, *Garcia and the Values of Federalism*, *Georgia Law Review* 19.4 (Summer 1985): 789-797; John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, *California Law Review* 90.2 (March 2002): 485-571; Wilson Carey McWilliams, *Democracy and the Citizen: Community, Dignity, and the Crisis of Contemporary Politics in America*, in *How Democratic is the Constitution?* Ed. Robert A. Goldwin and William A. Schambra, Washington, D.C.: American Enterprise Institute, 1980.

³⁷ John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, *California Law Review* 90.2 (March 2002): 485-571.

³⁸ *Ibid.* 510.

*United States v. Lopez*³⁹ and *United States v. Morrison*.⁴⁰ In light of the fact that the Violence Against Women Act “purported to benefit half the population,” McGinnis explains, the *Morrison* decision in particular demonstrated the Rehnquist Court’s “serious commitment to federalism.”⁴¹ For the Rehnquist Court to find justification for such decisions in Tocqueville’s theory of federalism and decentralization, Tocqueville basically would have had to endorse federalism for its own sake, and advocate protecting the states from encroachment by the national government regardless of any law’s potential to address or ameliorate a national problem.⁴²

Rather than reading Tocqueville as decidedly in favor of states’ rights, some have described his account of American federalism as scattered, confused, and even contradictory.⁴³ Ralph Hancock cites Tocqueville’s vacillation between describing America as a unified republic and a confederation at different points in *Democracy in America*, and interprets such inconsistency as evidence of a deep grasp of “the problem of American federalism” during this period.⁴⁴ Marking the Civil War Amendments as the turning point that would determine that the American Constitution was indeed a nationalist Constitution, Hancock explains that when Tocqueville wrote, America could still go “in either of two directions,” enshrining either the supremacy of the national

³⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

⁴⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

⁴¹ McGinnis 515.

⁴² See also Koritansky 65-66, 72 for a direct challenge to this conclusion.

⁴³ Hancock 89.

⁴⁴ *Ibid.* 91.

government or a robust understanding of states' rights.⁴⁵ And so, he concludes, clarity on this particular subject at this particular time was all but impossible, even for Alexis de Tocqueville.

Perhaps it is not surprising that people have interpreted Tocqueville on federalism so differently given his complex analysis of governmental and administrative (de)centralization detailed in the previous section, as well as his descriptions of the United States Constitution as both a confederation of sovereign states and a unified nation with a strong central government. In this paper, I will offer a different account of Tocqueville's federalism. Previous accounts have focused mainly on the benefits of federalism, according to Tocqueville, paying little if any attention to Tocqueville's understanding of the logic of the American Constitution in the abstract. Though he certainly concedes the practical power of the states and the fundamental need for local politics, I will argue that Tocqueville already sees much more of a national logic than a federal one in the 1787 Constitution.

⁴⁵ Ibid.

IV. Constitutional Logics: Nationalism and Federalism

In the previous section we saw how people have read Tocqueville on federalism in various ways; adjudicating between these different readings may seem like an insurmountable task. However, if Tocqueville's general prescriptions for modern democracy grow out of his particular descriptions of America, then we may gain some insight into his prescriptions regarding administrative decentralization and governmental centralization by considering his observations of federalism in the new republic. What, then, *is* Tocqueville's understanding of American federalism, both as a constitutional matter and as a matter of fact, and what does he take to be its virtues and vices?

As explained previously, Tocqueville draws heavily on *the Federalist Papers* in expounding the United States Constitution.⁴⁶ In his first explanation of the relationship between the states and the national government, he paraphrases Madison in *Federalist* 45⁴⁷:

The duties and rights of the federal government were simple and fairly easy to define, because the Union had been formed to respond to a small number of important general needs. By contrast, the duties and rights of state governments were manifold and complex, because the states were involved in every detail of social life. Hence the prerogatives of the federal government were carefully defined, and it was stipulated that any prerogative not comprised within that definition was to be retained by the states. Thus state governments remained the rule; the federal government was the exception.⁴⁸

⁴⁶ Tocqueville 129.

⁴⁷ For some reason, Tocqueville cites this as *Federalist* 41.

⁴⁸ Tocqueville 129.

This is a fair paraphrase of Madison’s explanation in this passage, and captures a picture of the Union that Madison tries to sketch elsewhere, as in *Federalist* 39. Initially assuming this description from *The Federalist*, Tocqueville portrays a system of government in which the national powers are “few and defined,” and the state powers are “numerous and indefinite.”⁴⁹ He seems to accept this picture of the American Constitution, that sovereignty is equally divided between the states and national government,⁵⁰ and even that the Union is “a mere assemblage of confederated republics.”⁵¹ The implication of this understanding is that the states occupy one sphere of government, and the national government occupies another, and that each level is precluded from intruding into the sphere of the other. In this particular passage, Tocqueville questions neither the effective possibility of this arrangement, nor the implications of such an arrangement for the long term, both of which are questions worth asking in light of America’s experience with Articles of Confederation—a plan of government which in many ways fit this same description.

In the very next section, however, Tocqueville seems to find a tension in this understanding of the Constitution. In describing the establishment of the Senate and House of Representatives, he explains how each was born out of a different vision for the Union: “One group of people wanted the Union to be a league of independent states....Another group wanted to consolidate all inhabitants of the former colonies into a

⁴⁹ Madison 289.

⁵⁰ Tocqueville 128, 131.

⁵¹ Ibid. 131.

single nation.”⁵² Though he paints a flattering picture of the collaboration that characterized the Philadelphia Convention,⁵³ Tocqueville also explains that the clash of these two visions resulted in a Constitution that bent “the rules of logic.”⁵⁴ He explains that the framers adopted a “middle path” between a league of independent states and a consolidated nation, a compromise that “peremptorily reconciled two *theoretically irreconcilable* systems”⁵⁵ (emphasis added). Though Madison gives a similar account of the different logics of the two houses of Congress in *Federalist* 39, he does not describe the logics of these systems as irreconcilable. Why, then, would Tocqueville view the bicameral legislature and general logic of the Constitution this way?⁵⁶

Tocqueville’s reasons for concluding that these systems are theoretically irreconcilable become clear when we consider his account of the principles behind these respective systems. The goal of taking this “middle path,” according to Tocqueville, was to ensure that the states governed themselves “in all matters pertaining solely to their internal prosperity,” without causing the Union to “cease to exist as a body or to fail to meet its general needs.”⁵⁷ Theoretically, it is impossible that both of these principles, of state independence and of national sovereignty,⁵⁸ be equally foundational or essential to the constitutional schema. Tocqueville raises the all-too-real possibility of individual

⁵² Ibid. 132.

⁵³ Ibid. 127-128.

⁵⁴ Ibid. 133.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid. 128.

⁵⁸ Ibid. 133.

states acting in ways that jeopardize the welfare of the whole nation, adding that some states had already caused such mischief.⁵⁹ In such cases, either the principle of state independence or the principles of unity and the general welfare can triumph. Not both. Though it is possible that, in practice, these two principles may coexist relatively peacefully, it seems that one of the two necessarily must take theoretical priority since instances of conflict are conceivable and, more importantly, since these principles are in themselves opposed. For, regardless of the constitutional division of powers that begins to outline different spheres of action, the states are not truly independent if the national government can compel certain actions it deems necessary for the general welfare; nor is the national government truly sovereign if the states, in their independence, can thwart national policies.⁶⁰

Perhaps principles that are theoretically irreconcilable may still be reconcilable to in practice, however. This seems to be what Tocqueville has in mind when he suggests that the “rules of logic were bent”⁶¹ when the framers constituted different institutions, such as the Senate and House, whose underlying principles were in conflict. Reminiscent of Madison’s *Federalist* 39, though some aspects of the Constitution may seem to be grounded in the independence of the states, other aspects are grounded in and bolster the supremacy of the national government. Still, it is worth asking whether such practical reconciliation is sustainable in light of the enduring theoretical conflict. If these systems

⁵⁹ Ibid. 130.

⁶⁰ Tocqueville suggests that it is one of the prerogatives of the “high federal court” to maintain the division of power between the national and state governments (Tocqueville 130).

⁶¹ Tocqueville 133.

of government are theoretically irreconcilable, as Tocqueville suggests, then it seems that any compromise between them would necessitate nothing less than compromise in the fundamental nature of at least one of these two principles, even in practice.⁶² Indeed, it is impossible to see how both principles might simultaneously prevail, even in practice, when individual states jeopardize the security and existence of the Union. And indeed, the conventional wisdom that the national government increasingly dominates politics in the United States would corroborate this suggestion that one logic must prevail in the end, though proponents of both logics live on.

Still, we ought not to dismiss the fact that Tocqueville does speak of a certain reconciliation; later passages of *Democracy in America* illuminate just how Tocqueville understood this reconciliation. Moving beyond and building on his description of irreconcilable national and federal logics, Tocqueville comes to describe the Constitution as creating an “incomplete national government.” He states:

[A] new form of society is found in which several peoples actually merge to form a single people, united with respect to certain common interests while remaining in all other respects separate, mere confederates. Here the central government acts directly on the people it governs, administering them and judging them as national governments do, but it does so only within a limited sphere. Clearly this is not a federal government; it is an incomplete national government.⁶³

⁶² Some scholars, such as Sotirios Barber, have argued that, despite initial efforts to appease the states, the United States Constitution actually engenders a nationalist logic and establishes a trajectory that makes for an increasingly powerful national government, per the Federalist vision. Sotirios Barber, *The Fallacies of States' Rights*, Cambridge, MA: Harvard UP, 2013. See also Malcolm Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise*, Ann Arbor: Michigan UP, 2011, for a discussion of federalism that engages this idea of “irreconcilable logics.”

⁶³ Tocqueville 178.

Once again, Tocqueville acknowledges the presence of two separate spheres of government, in keeping with the distinction he takes from *The Federalist*. However, he refers to the Constitution as creating an “incomplete national government,” and not a federal one. This idea is not necessarily explicit in *The Federalist*, and even seems to contradict Madison’s conclusion in *Federalist* 39 that the government is neither national nor federal, but “a composition of the two.” So, what exactly does Tocqueville intend by this turn of phrase?

While, on the one hand, the idea of an “incomplete national government” seems to depart from Tocqueville’s initial understanding of the separate spheres of government taken from *The Federalist*, it follows naturally from his account of the framers bending the rules of logic. Indeed, if the logics of state independence and of national efficacy are theoretically irreconcilable, then Madison’s conclusion in *Federalist* 39, that the new government was a “composition” of both the federal and national logics simply is not tenable. In many cases, it seems, one logic would have to trump, though elements of both might be present. And in this passage, Tocqueville seems to suggest that the United States Constitution is, at root, a national one. Characteristic of Tocqueville’s descriptions, however, his explanation about the national nature of the Constitution is complicated and so calls for greater nuance. After all, he describes the Constitution as establishing an *incomplete* national government. His meaning here, I argue, sheds further light on his description of the framers’ feat in reconciling the irreconcilable.

Tocqueville calls the government national insofar as it can act directly on the people within the states. He describes the government as incompletely national, therefore, because the national government can only act directly on the people for certain issues, “within a limited sphere.”⁶⁴ Thus, the states are also left a sphere in which they may govern. But the existence of such a sphere need not entail that its defining lines are entrenched as a constitutional matter. Much depends on the nature of those enumerated powers granted to the national government, to say nothing of whether certain areas in which the states typically legislate do bear on the national good in certain cases. Tocqueville never waivers in describing the national government as limited, or governmental powers as divided in the United States. Nevertheless, as I will argue in the next section, he is very concerned that the national government be able to maintain adequate power, even governmental centralization, to address the needs of the polity, and thinks that the Constitution does grant it such power.

⁶⁴ Tocqueville 178.

V. Nationalism and Federalism in the United States Constitution

Despite the initial impressions of American federalism that Tocqueville gleans from *The Federalist Papers*, he concludes that *The Federalist's* Constitution ultimately intends a national authority that is governmentally centralized. After analyzing the enumerated powers of the national government and citing *The Federalist* along the way, he explains:

If we take into account the division of powers established by the federal Constitution, as well as the portion of sovereignty that the individual states reserved to themselves as opposed to the share of power taken by the Union, it is easy to see that the framers of the federal Constitution had formed very clear and very accurate ideas about what I earlier called governmental centralization.

The United States is not only a republic but also a confederation. Yet national authority there is in some respects more centralized than it used to be in several of Europe's absolute monarchies.⁶⁵

While retaining the idea that the Constitution admits spheres of action for both the states and the national government, Tocqueville qualifies and complicates this initial observation describing the national government as governmentally centralized, and governmentally centralized as a *constitutional* matter. He examines the “division of powers,” and “portion of sovereignty” of each branch, considering both the nature and degree of the power that the Constitution grants the states against that which it grants the national government. And in fact, drawing on his earlier, more general discussion of governmental centralization, Tocqueville finds that the United States government is

⁶⁵ Tocqueville. 131.

equipped to govern the people directly, as Americans rather than citizens of their respective states.

Tocqueville makes much of the fact that the national government of the United States makes law with one voice in a single, albeit bicameral, legislature, and interprets law with one voice in the Supreme Court.⁶⁶ He finds such unity striking, particularly since his primary point of reference is the French model which includes “certain provinces known as *pays d’Etats*, which could refuse to cooperate when the sovereign authority,” as well as “thirteen sovereign courts” with the “right to interpret the law with no possibility of appeal.”⁶⁷ Even with the separation of powers, therefore, the unity with which the United States national government was constituted engenders precisely the sort of concentration of power that Tocqueville thinks is necessary for decisive governance according to the best interest of the nation as a whole.⁶⁸ Of course, there are subnational divisions along both state and federal lines; but under the United States Constitution these units must ultimately submit to a supreme legislative body and a final court of appeal, yielding a government that is able to speak with one voice in those matters that bear on the whole.

In addition to this unity necessary to govern for the national good, Tocqueville’s conception of governmental centralization requires the ability to “make people obey” its laws.⁶⁹ And indeed, the national government’s capacity directly to act upon individual

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid. 97.

⁶⁹ Ibid. 99.

citizens of the United States greatly impresses Tocqueville.⁷⁰ Individuals are subject to federal law not merely as citizens of the respective states forming the Union, but as Americans. In a discussion reminiscent of John Marshall's reasoning in *McCulloch v. Maryland*,⁷¹ Tocqueville explains how the bicameral legislature does not only represent the states, but represents, and so binds, the people themselves. He describes taxes levied by "the representatives of the nation," for example, as placing an obligation on "each and every citizen."⁷² In this way, we see how the United States national government enjoys both the right and the power to act, not merely as referee among the states, but as government of the people. Within the constitutional limits (that, for all his talk of governmental centralization, Tocqueville never fails to recall) the United States government thus has the power to legislate for individual citizens, extending its reach past, and even against, the laws and policies of their home states when necessary.

Taken together, these two features that Tocqueville recognizes as inhering in the United States Constitution paint a picture of a strong national government of a Hamiltonian stripe. This unity at the center and this power to act directly upon the people, are not distinct for Tocqueville, but are inter-reliant features that make for a truly efficacious national government. Indeed, there is little reason to have a unified national government if it does not intend to speak for an entire nation on certain meaningful

⁷⁰ Ibid. 131.

⁷¹ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁷² Tocqueville 131.

questions; and a government cannot represent and bind an entire people if it is not unified in its laws and policies.

In this way, Tocqueville looks beyond *Federalist* 45's understanding of national powers as "few and defined" and of state powers as "numerous and indefinite," finding that the national government's few and defined powers to be dominant and robust, while the numerous and indefinite powers of the states are confined in reach and impact. He offers a picture of the states as lacking the same independence as the national government, their laws largely contingent on what actions the national government chooses to take first as it pursues what it determines to be in the national interest. Tocqueville understands national powers and centralization as limited to those issues "common to all parts of the nation,"⁷³ issues that he draws from Article 1 Section 8 of the Constitution, but acknowledges the additional powers that come of the need to secure such vast ends. He explains, for example, that "since the federal government had to be able to meet its assigned obligations, it was granted the unlimited right to levy taxes,"⁷⁴ perhaps the greatest possible grant of power if indeed "the power to tax involves the power to destroy."⁷⁵ As the national government's obligations extend much further and take a broader view than those of the states, Tocqueville finds a national authority more centralized than that of "several of Europe's absolute monarchies,"⁷⁶ at least in terms of constitutional right and authority. Whether Tocqueville actually observed the national

⁷³ Ibid. 97.

⁷⁴ Ibid. 131.

⁷⁵ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁷⁶ Tocqueville. 131.

government enjoying such authority during his visit to America is a different matter which I will take up in the next section.

One could argue that Tocqueville still understands the national government as “incomplete,” or the Union as “a mere assemblage of confederated republics,”⁷⁷ however, and that this incompleteness should qualify the conclusion, whether Tocqueville’s or ours, that the Constitution is fundamentally “national.” Indeed, Madison seems to make a similar point in arguing that the Constitution is partly federal and partly national in *Federalist* 39.⁷⁸ The success of this argument, however, depends on the *manner* in which the national government is limited. Is it limited by certain entrenched prerogatives of the states, knowable through strict interpretation of the fixed powers which the Constitution explicitly confers on the national government? Or is the national government limited only by the fact of its “assigned obligations” in the Constitution,⁷⁹ retaining the power to pursue those ends and obligations by the means it deems necessary?⁸⁰ If the former, then perhaps Tocqueville’s understanding of the American Constitution would entail a federalism that contemporary (and, indeed, past) proponents of states’ rights could endorse. If he intends the latter understanding, however, then it seems that Tocqueville’s

⁷⁷ Tocqueville 131.

⁷⁸ Madison 242.

⁷⁹ Tocqueville 131.

⁸⁰ See Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819): “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” See also, Sotirios Barber, *The Fallacies of States’ Rights*, Cambridge, MA: Harvard UP, 2013, 34.

Constitution is simply in conformity with the principle of constitutional governance, albeit with a nationalistic inclination that precludes anything like robust state sovereignty.

On this very question, Tocqueville explains that although “each state government was considered to be free to act within its own sphere,” the national government can actually “intervene in the internal affairs of the states” when the states abuse their independence and, “by acting imprudently, compromise the security of the Union as a whole.”⁸¹ This is not an insignificant admission. Indeed, though the states might retain their own sphere of governance on some level, this ability to interfere, and interfere when the national government judges it is necessary for the good of the Union, effectively precludes anything like a robust sovereignty of the states, with rights that are entrenched and inviolable.

As initial examples of the national government’s “right to interfere” in the business of the states, Tocqueville points to the Constitution’s prohibitions against ex post facto laws⁸² and titles of nobility.⁸³ These prohibitions are not insignificant for the simple fact that they indicate that the nation as a whole will share a certain character, and constitute “a single and unique people”⁸⁴ unified by a commitment to certain principles. However, later in Volume 1, Tocqueville’s discussion of nullification and interposition throws into sharp relief this point of the national government’s right to interfere. He addresses the issue of nullification in his chapter on the “three races.” He states:

⁸¹ Tocqueville 130.

⁸² United States Constitution, Article 1, Section 9, Clause 3.

⁸³ United States Constitution, Article 1, Section 9, Clause 8.

⁸⁴ Tocqueville 450.

[The] purpose of the federal constitution was not to establish a league but to create a national government. In all the cases foreseen by the Constitution, the Americans of the United States constitute a single and unique people. In each such instance, the national will is expressed, as with all constitutional peoples, by way of a majority. Once the majority has spoken, the duty of the minority is to submit. That is the legal doctrine, the only one in agreement with both the text of the Constitution and the known intent of its framers.⁸⁵

This conclusion is far from describing the state and national governments as having separate spheres of influence. Here we see that although the national government may be limited to a set of ends prescribed by the Constitution, it has the right to compel those individuals and states that may disagree to comply with its judgments about the proper way to pursue those ends. Therefore, a government may be called national by virtue of the nature of its powers, and its liberty to employ a range of means in exercising those powers, including means against the states. Meanwhile, the national government can still be limited by virtue of the fact that it is limited to those powers delineated in the Constitution. As Tulis and Mellow explain, “‘Limited government,’ then, should refer to the purposes of power, not the amount of power required to effect legitimate purposes.”⁸⁶

Tocqueville is disinclined to call the government federal, or a combination of federal and national, but rather opts for the description of “incomplete national government.” For ultimately there is nothing properly federal⁸⁷ about a Constitution that would allow, even demand, a national government’s intervention into the affairs of the

⁸⁵ Ibid.

⁸⁶ Tulis 165.

⁸⁷ At least this could not be described as federal by the Anti-Federalists understanding of the word. See Martin Diamond 93-107.

states when deemed necessary for the general good of the nation. What he finds, therefore, is a Constitution that aligns much more closely with a nationalist vision of America than his initial reading of *The Federalist Papers*⁸⁸ suggests.

⁸⁸ Tocqueville 129.

VI. *Competing Theories of Federalism in Tocqueville's America*

Although such a centralized national government admittedly can be expansive, the fact that it is limited with regard to purpose or subject matter makes it compatible with some exercise of local autonomy in those matters that affect only a particular part of the nation. This autonomy may take the form of either administrative decentralization among the states, which Tocqueville clearly advocates, or also a sort of governmental centralization in the states themselves.⁸⁹ Nevertheless, as argued in the previous section, this ability of the states to govern with regard to internal affairs does not, on Tocqueville's telling or even logically speaking, entail that they retain the same right to supersede competing laws as the national government, a point which becomes particularly clear in Tocqueville's criticism of the doctrine of nullification.

Though Tocqueville understands the *logic* of the Constitution as engendering a national government that is governmentally centralized, this logic does not necessarily reflect his assessment of the actual state of affairs in America. He explains that "the *nullifiers* of the South" understand the American union not as a single and unique nation, but as a league uniting sovereign and independent states. Observing that state legislatures were increasingly accumulating governmental power,⁹⁰ and that "love of provincial government" was gaining traction in America, he forecasts that the power of the national

⁸⁹ Tocqueville 191-192.

⁹⁰ *Ibid.* 100.

government will weaken, and so jeopardize the very existence of the Republic,⁹¹ a prediction that would be affirmed a short thirty-five years after he wrote.

Even aside from the extreme case of nullification, however, Tocqueville worries about the degree of centralization within the individual states. Although the framers may have intended to “constitute a single and unique people,”⁹² Tocqueville notes the power that the states maintain in fact, as the degree of their centralization at that time rivaled that of the national government.⁹³ He explains, “The sovereignty of the Union is new, whereas the sovereignty of the states was born with the nation itself. The sovereignty of the Union is the work of art. The sovereignty of the states is natural; it exists by itself, without effort, like a father’s authority in a family.”⁹⁴ Moreover, insofar as the state legislatures constantly seek to gratify majorities, with less regard for the merit of their positions, they can pass law virtually unopposed. He explains, “[T]here is nothing to limit [a state’s] action but its own will.”⁹⁵

Though the states may, as a matter of fact, maintain such a hold on the affections of their respective citizenries, it does not follow that Tocqueville is comfortable with such strong states or thinks that such power is in line with the logic of either *The Federalist* or the Constitution itself. We have seen that Tocqueville understands the “work of art” that is the United States Constitution as having a unifying purpose, and as giving the national

⁹¹ Ibid. 450.

⁹² Ibid.

⁹³ Ibid. 99.

⁹⁴ Ibid. 189.

⁹⁵ Ibid. 100.

government the important right to supersede the states when they act “imprudently.”⁹⁶ But Tocqueville was uneasy about the relationship between national and state government that he observed while in America, explaining that the centralization of the state governments allowed majorities to govern unrestrained, and so threatened the future of political liberty.⁹⁷ For this reason, he suggests that the constitutionally centralized national government may not be sufficiently centralized as a matter of fact to realize the Constitution’s logic and so secure its own survival.⁹⁸

Though Tocqueville is wary of the degree of governmental centralization among the states, he celebrates the extent to which they enjoy administrative decentralization. Indeed, he believes that such decentralization is actually necessary for the preservation of liberty in America.⁹⁹ It is for this reason, and this reason alone, that he admires American federalism, describing the country as “par excellence the land of provincial and local government.”¹⁰⁰ To the extent that the administration of law is still political, administrative decentralization is sufficient to reap all the benefits that Tocqueville associates with federalism,¹⁰¹ all while equipping the national government with the necessary powers to govern a truly unified nation. Therefore, neither the benefits that Tocqueville sees in federalism, nor the logic that Tocqueville sees in the Constitution

⁹⁶ Ibid. 130.

⁹⁷ Ibid. 298-299. Koritansky 68.

⁹⁸ Tocqueville 191.

⁹⁹ Koritansky 72-73.

¹⁰⁰ Tocqueville 457.

¹⁰¹ See generally, Ralph C. Hancock, *Tocqueville and the Good of American Federalism*, *Publius* 20.2 (Spring 1990): 89-108.

require the sort of sovereignty that Southern nullifiers and states' rights advocates of a certain kind demand.

Tocqueville repeatedly describes the states as naturally powerful; however, I have argued that this is not so much an account of the Constitution's logic as it was simply the state of affairs when he wrote. In bringing his own reasoning to bear on such primary accounts of the American Constitution as *The Federalist*, Tocqueville concludes that the Constitution is decidedly not federal. If this analysis is correct, then, the inconsistency in Tocqueville's language is not so much a function of his uncertainty about the entrenchment (or lack of entrenchment) of states' rights in the Constitution, as much as it is an effort to grapple with vestiges of past ways of thinking still manifest in the language and even the practical power of the states. At base, he is of the understanding that the national government can, within its own Constitutional limits, supersede the states.

VII. Conclusion

As explained in the third section of this paper, some readers of Tocqueville, academics and politicians alike, have interpreted his praise of administrative decentralization as an unqualified endorsement of federalism. Others have read Tocqueville as understanding the United States as both a unified nation and a confederation of republics. They explain this seeming inconsistency or confusion as evidence of a certain “problem of American federalism,”¹⁰² with which Tocqueville could not but contend during his journey given the purportedly indeterminate state of the Constitution at that time.

My reading of Tocqueville tells a different story. Though Tocqueville certainly concedes the practical or “natural” power of the states, he sees much more of a national logic than a federal one in the Constitution. For how can someone that is unsure about the nature of the American Constitution (as Ralph Hancock suggests of Tocqueville¹⁰³) be so unequivocal in judging nullification as incompatible with the Constitution? Or be so confident in the right of the national government to intervene when the states jeopardize the interests of the nation? Indeed, there are better explanations for Tocqueville’s occasional description of America as a confederacy or the states as sovereign, as I have argued herein. First, the fact that his starting point was *The Federalist Papers* is not insignificant, insofar as the authors of these papers would have had an interest in

¹⁰² Tocqueville 91.

¹⁰³ Ibid.

downplaying the extent to which the new Constitution created a truly national government.¹⁰⁴ As argued in sections four and five of this paper, however, Tocqueville ultimately thinks beyond some of the language of *The Federalist Papers*, to come to his own conclusions about the logic of the Constitution. Second, Tocqueville's seeming inconsistency in his characterization of the United States can be explained by the general state of political discourse at the time, in which the language of confederation was still very much present while people tried to make sense of, and even resist the character of, this new government.

In recounting the argument of *Federalist* 39, Jack Rakove explains that Madison intended neither to do away with the states entirely, nor to preserve the level of autonomy they enjoyed under the Articles of Confederation. He explains Madison's purpose as being "to create a new definition that would relegate the state governments to some midpoint along the 'gradation' of 'political societies' ranging from 'the smallest corporation, with the most limited powers to the largest empire with the most perfect sovereignty.'" ¹⁰⁵ Similarly, my reading of Tocqueville suggests that he understood the states as part of the constitutional framework, but not as entitled to any powers in particular. Indeed, though Tocqueville does recognize a connection between republican virtue and local politics, he does not necessarily connect *good government* with local

¹⁰⁴ Tulis 165.

¹⁰⁵ Rakove 169.

politics. On the contrary, Tocqueville charges the national government with controlling the abuses of the states, so as to preserve all that is good about the United States.

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